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ABSTRACT

Until the early 1950s, the courts consistently held that the state had plenary power over education. However, since 1950, state and local educational policy has been modified as a result of decisions based on the First, Fifth, and Fourteenth Amendments. These decisions have affected such issues as teacher dismissal, freedom of speech, and teachers' personal lifestyles. Unless a teacher's conduct can be shown to interfere with efficiency and discipline in the operation of the school, a school board may not restrict the teacher's freedom of speech outside the classroom, academic freedom inside the classroom, choice of personal lifestyle and acquaintances, or political and civil rights activities. In 1978, the United States Supreme Court ruled that school officials do not have absolute authority over their students and the basic rights of students were also upheld. Educators, some of whom are concerned about the courts' intrusion into educational policy making, may be partly to blame for recent court action because of their insensitivity to the concerns of teachers, students, and parents. (Author/WD)

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EDUCATIONAL POLICY DEVELOPMENT BY THE COURTS

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Educational Policy Development by the Courts

In the California school records published in the early 1870's or 1880's, the following policies were promulgated by the school committee for the governance of teachers:

1. The teacher's day in school shall consist of ten hours. Teachers are expected to spend the remaining time reading the Bible or other good books.

2. Teachers are expected and required to fill the school lamps every day, trim the wicks and clean the chimneys.

3. Every teacher is expected and required to bring to school each day one bucket of fresh water and one scuttleful of coal.

4. Teachers are responsible for keeping the stove in good condition, properly blacked and polished, and for the removal and disposal of the ashes.

5. It is part of the teacher's duty to provide suitable quills to make pens for the pupils. They should be carefully cut to suit the various tastes of the pupils.

6. Women teachers who marry or indulge in unseemly conduct will be dismissed.

7. Male teachers are permitted one evening a week for courting purposes. Those who are regular in their attendance at Sunday services, upon application, may be granted one additional evening.

8. Teachers who smoke or use liquor in any form will be liable to instant dismissal.

9. Male teachers who frequent pool or public halls or get shaved in a barber shop will forfeit the good opinion of the school board and of the community with regard to his honesty, integrity, intentions and personal worth.

10. Teachers who hope to remain in good standing will set aside from each salary payment a goodly portion to provide for their care in declining years. Teachers who neglect thrift at the risk of becoming a burden upon society cannot expect to gain the respect of the community or their employment.

11. Teachers who perform their labors faithfully and without fault, maintaining their modesty and personal aplomb, for a period of five years, may look forward to an increase in

> wages of 25 cents per week, provided the Board of Education approves.[1]

Although we may chuckle at these regulations, it is not surprising that a school board in the nineteenth century would have a substantive and material interest in promulgating them. The mores of the era required that teachers be paragons of virtue in the community. In 1924, the Supreme Court of California affirmed this:

> ...the calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or which fail are so numerous, that they are incapable of enumeration in any legislative enactment, ...[the] teacher is intrusted with the custody of children and their preparation for the useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.[2]

Indeed, as late as 1939, the courts were saying:

> It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance.[3]

The school board members, therefore, would have had feelings not only of self-righteousness, perhaps, but also of security that there would be no challenge to their exercise of power. First, they felt that they were protected legally. Since the United States Constitution is silent with respect to education, education by virtue of the Tenth Amendment is one of the powers reserved to the states and to the people. The majority of the

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[1] "A School Teacher's Lot Was Not a Happy One". The Sun, 1965.

[2] Goldsmith v. Board of Education, 66 Cal. App. 157, 225 P.2d 783 (1924) at 787.

[3] Horosko v. Mt. Pleasant Township School District, 335 Pa. 369, 6A2d 866, cert. den. 60 S. Ct. 01, 308 U.S. 533, 84 L.Ed. 465 (1939).

constitutions of the states require that a system of free public education be established by appropriate legislation. State statutes delineate broad boundaries and general policies within which the schools are to be created, organized, maintained and operated. The majority of the state legislatures have given an expressed or implied broad grant of discretionary power to local school districts for the day-to-day operation of the schools, and grant includes the adoption of rules and regulations.

Second, from 1789 to 1896, a period of 107 years, only fifty cases were decided by the federal courts; as recently as 1926, a period of 137 years, only 131 cases had been decided.[4] Relying on the omission of the mention of education in the federal Constitution, the courts consistently held that the state had plenary power over education. State legislatures had placed the operation of schools at the local level, and state courts upheld policies and practices of the school districts unless they were clearly and blatantly capricious or arbitrary. Educators, therefore, could presume to continue to expect to be supported in the courts when their practices were challenged. The educational establishment was insensitive to the fundamental concerns and rights of teachers and students as individuals who had the same constitutional rights as other citizens. The state courts supported this presumption and a body of case law developed with little consideration of the violation of federal constitutional guarantees. Few cases reached the Supreme Court. Educational policy was in the hands of the educators.

However, in the early 1950's issues began to be raised which caused the federal courts to become sensitive to the constitutional abuses of educational policies and practices, and the Supreme Court began to place limitations on the power of the educational establishment. Since 1950, state and local

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[4]John C. Hogan. The Schools, the Courts and the Public Interest. Lexington, Mass.: D.C. Heath and Co., 1974, p. 7.

educational policy has been modified as a result of decisions based upon the First, Fifth and Fourteenth Amendments, which guarantee freedom of religion, speech and press, peaceable assembly and the right to due process (both substantive and procedural) and equal protection of the laws.

Although few aspects of education have escaped the attention of the courts, this paper will be restricted to some of the educational policies involving teachers and students.

DISMISSAL OF TEACHERS

State legislatures have adopted regulations setting forth grounds for the dismissal of teachers. These reasons include dishonesty, immorality, insubordination, inefficiency, intemperance, incompetency, negligence in the execution of duties, subversion, wilful neglect of duty, conviction of a crime, conduct unbecoming a teacher, physical or mental disability, inadequate performance, decrease in enrollment or economics, or other good and just cause. These grounds are not defined in the statutes, thus permitting local districts a broad interpretation of the grounds for dismissal. Relying on these statutes, school boards interpreted various activities of teachers as clear indications of their unfitness to teach, and teachers were dismissed even though they might have been exercising their constitutionally protected rights.

Speech out of the Classroom

During World War II the dismissal of a male teacher in Florida[5] was upheld by the Appellate Court of Illinois. He had been dismissed for publicly stating that he was a conscientious objector and would not aid the United States as a combatant or non-combatant. Although he was

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[5] Joyce v. Board of Education, 60 N.E. 2d 431 (Ill. 1945), cert. den., 327 U.S. 786 (1946).

conscientious, experienced and well-qualified professionally, the court reasoned that he was incompetent because he was incapable of teaching his students honesty and patriotism by precept and example.

By 1968, the United States Supreme Court began to realize that, at the same time the school districts were protecting students from "incompetent teachers," they were violating the constitutional right of teachers to exercise their freedom of speech outside the classroom. Marvin L. Pickering, a teacher in Illinois, was dismissed

> for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools.[6]

The board had determined

> that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district..."[7]

The Court found that the

> teacher had made erroneous public statements upon issues then currently the subject of public attention, which were critical of his ultimate employer but which were neither shown nor could be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances it concluded that the interest of the school administration in limiting teachers' opportunities to contribute to public debate was not significantly greater than its interest in limiting a similar contribution by any member of the general public.

The Court then held that

> ...Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not

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[6]Pickering v. Board of Education of Township High School District, 205, Will County, Illinois, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) at 564.

[7]Ibid. at 572-3.

> furnish the basis for his dismissal from public employment.[8]

Following the Pickering decision the California Supreme Court enjoined the enforcement of a school board regulation prohibiting teachers from circulating a petition on school premises during duty-free lunch periods. The petition, opposing certain reductions in the proposed budget of the state legislature, was controversial and had the potential of creating some discord and disturbance within the school district, but the court noted that:

> (t)olerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required even in the schools.[9]

It concluded that the circulation of the petition, which was designed to make administrators and legislators more responsive to the needs of their constituents, could not constitutionally be restricted except to ward off a real and imminent danger which involved far more than "public inconvenience, annoyance, or unrest."

In the Pickering decision the Court had established the following standards for analyzing the effect of one's speech:

1. the probability of a disruption of the harmony between the teacher and the person with whom he would normally be in contact in the course of his daily work
2. the real and imminent danger of a disruption of the schools
3. evidence of unfitness to teach from the content of the statement
4. false statements knowingly or recklessly made
5. special obligations to one's superiors or breach of confidentiality

Thus, the Court recognized that the right to speak outside the classroom

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[8]Ibid. at 574.

[9]Los Angeles Teachers Union, Local 1021 v. Los Angeles City Board of Education. 78 Cal. Rptr. 723, 455 P. 2d 827 (1969) at 832.

is not an absolute one. When two teachers in a small, thirty teacher Alaskan school district were dismissed for compiling, reproducing and distributing an open letter which was critical of the superintendent, their dismissal was upheld. The Supreme Court of Alaska said:

> There is no question but that appellants had a constitutional right to compile, reproduce and distribute the Open Letter...But this does not mean that they cannot be held appropriately accountable where their acts wrongfully damage their own and another's professional prestige, reflect detrimentally on the teaching profession as a whole and result in a loss of respect by the public for appellants and the local school system.[10]

The Court found that the teachers' activities in circulating the open letter justified their dismissal based upon the Pickering standards.[11] It said:

1. the school superintendent has a close relationship with both teachers and students which may not exist in larger areas.[12]

2. ...what the appellants did...could not help but be detrimental, not only to discipline, but also to harmony among co-workers, and to the operation of the schools.[13]

3. ...of the various charges which were compiled, reproduced and distributed to the public at large, six were false statements of fact. All of the false statements reflected on the integrity and professional ability of the superintendent...All of the false statements were an indictment of the Seward School System as a whole.[14]

4. Appellants' false statements were not connected with good faith and were made in reckless disregard of the truth.[15]

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[10] Watts v. Seward School Board, 421 P2d 586 (1966) at 606-7.

[11] See also, ibid. 395 P2d 372 (1964), reh. den. 433 P2d 678 (1967), 454 P2d 732 (1969).

[12] Ibid. 454 P2d at 735.

[13] Ibid.

[14] Ibid. at 736.

[15] Ibid. at 737.

Following this decision, the Alaska legisture amended the statute dealing with the dismissal of teachers as follows:

> No rule or regulation of the commissioner of education, a school board, or local school administrator may restrict or modify the right of a teacher to engage in comment and criticism outside school hours, regarding school personnel, members of the governing body of any school or school district, any other public official, or any school employee, to the same extent that any private individual may exercise the right.[16]

Thus, the court influenced the legislature to change its policy, recognizing that teachers have the same right of freedom of expression as others.

Because of these and other decisions, teachers are now free, within the Pickering standards, without fear of unwarranted dismissal

- to criticize the school board or superintendent,
- to comment freely on the school budget or other school matters,
- to speak out when fellow teachers or students have been treated unfairly,
- to remain silent in full exercise of their Fifth Amendment rights.[17]

Speech Within the Classroom

Freedom of speech of teachers has been an issue within the classroom as well as outside the classroom. States, in exercising their plenary power over education, have prescribed curriculum, restricted the use of instructional materials to those approved by them and limited the "market-place of ideas." State courts have upheld the censorship of disagreeable philosophies, regionally unpopular theories, and schools of thought alien to the majority one.

The Tennessee General Assembly of 1925 enacted what is popularly

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[16] Alaska Comp. Laws, §14.20.095 (1966).

[17] Garrity v. New Jersey, 385 U.S. 493 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Slochower v. Board of Higher Education of NYC, 350 U.S. 551 (1956).

known as the Tennessee Anti-Evolution Act[18], which provided

> §1 That it shall be unlawful for any teacher in...[the] public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals
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> §2 That any teacher found guilty of the violation of this Act, shall be guilty of a misdemeanor and upon conviction, shall be fined not less than One Hundred ($100.00) Dollars nor more than Five Hundred ($500.00) Dollars for each offense.

John Thomas Scopes was convicted under this statute. The Supreme Court of Tennessee upheld the statute, finding no violation of either the Tennessee or the United States Constitution. It said:

> If the Legislature thinks that, by reason of popular prejudice, the causes of education and the study of science generally will be promoted by forbidding the teaching of evolution in the schools of the state, we can conceive of no ground to justify the court's interference. The courts cannot sit in judgment on such acts of the Legislature or its agents and determine whether or not the omission or addition of a particular course of study tends to cherish science.[19]

The issue was not resolved until Susan Epperson was required to use a new textbook to teach tenth grade biology in contravention of an Arkansas statute[20] that made it unlawful for a teacher in any state-supported school or university to teach or use a textbook that teaches "that mankind ascended or descended from a lower order of animals." She sought a declaration that the statute was void and that the State and the school system be enjoined from dismissing her for violating the statute. The Chancery Court of Arkansas held the statute to be an abridgement of free speech violating the First and Fourteenth Amendments. The Supreme Court of Arkansas reversed the Chancery Court, sustaining

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[18] Acts Tenn. 1925, c.27.

[19] Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) at 366.

[20] Ark. Acts 1929; Ark. Stat. Ann. §§ 80-1627 - 80-1628 (1960 Repl. Vol.).

the statute as within the State's power to specify the public school curriculum. The United States Supreme Court[21] reversed the Supreme Court of Arkansas, holding that the statute violated the Fourteenth Amendment, which embraces the First Amendment's prohibition of state laws respecting an establishment of religion.

The full protection of the academic freedom of teachers in the classroom, however, developed from cases involving requirements for signing loyalty oaths. In Wieman v. Updegraff the United States Supreme Court said:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of these amendments vividly into operation. Such unwarranted inhibition...has an unmistakable tendency to chill that free play of spirit which all teachers ought especially to cultivate and practice...[22];

in Shelton v. Tucker, the Court said:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.[23];

and in Sweezy v. New Hampshire:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made...Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain

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[21] Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968).

[22] 344 U.S. 183 (1952) at 195.

[23] 364 U.S. 479 (1960) at 487.

> new maturity and understanding; otherwise our civilization will stagnate and die.[24]

Thus, the Supreme Court restricted the rights of school boards, administrators, and parents to limit free speech to their own personal opinions and prejudices.

> Under our Constitution, free speech is not a right given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a haven for crackpots.[25]

Teachers are, therefore, free to discuss all sides of controversial topics, ideas and philosophies that relate to their particular subjects. Freedom of speech may be restricted only where it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools."[26]

> ...in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression...In order for school officials to justify the prohibition of a particular expression, they must be able to show that their action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[27]

Freedom of expression is not absolute, however, and in judging the appropriateness of the expression, the level of education, the subject which is taught, and the nature of the statement may be considered.

In addition to dismissal for speech in and out of the classroom, teachers have been dismissed for

- having been indicted for a crime, independent of the outcome of the trial,

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[24] 354 U.S. 234 (1956) at 250.

[25] Tinker v. Des Moines Independent Community School District. 393 U.S. 503, 89 S. Ct. 733 (1969) at 513.

[26] Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966) at 749.

[27] Tinker at 508-9.

- living on a communal farm where few people had salaried positions,
- writing a private letter, including "dirty words," to a former student,
- failing to stop after a minor accident,
- engaging in political and civil rights activities,
- having membership in "subversive" organizations,
- refusing to participate in civil defense shelter drills,
- admitting or engaging in homosexual acts.

With respect to homosexuality, school boards equated homosexuality with immorality (and consequently, unfitness to teach) leading to dismissal. However, in 1969, the Supreme Court of California established a legal test to be used in such cases. It said:

> In determining whether the teacher's conduct indicates unfitness to teach, the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.[28]

Thus, the courts established job-related criteria by which to judge the impact of acts outside the school setting. They established the principle that

> The private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher...Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline.[29]

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[28] Morrison v. State Board of Education, 1 Cal. 3d 214, 461 P. 2d 375 (1969) at 387.

[29] Jarvella v. Willoughby-Eastlake City School District, 12 Ohio Misc. 288, 233 N.E. 2d 143 (1967) at 145-6.

As a result of the intrusion of the courts into educational policy making, unless the conduct of a teacher can be shown to interfere with the efficiency and discipline in the operation of the schools, school boards may not restrict

- the right to speak freely outside the classroom,
- academic freedom within the classroom,
- personal appearance,
- activities in one's personal life,
- one's friends and associates,
- political and civil rights activities

and must apply principles of due process in suspension and dismissal cases.

STUDENTS

Just as school boards prescribed rules for the conduct of teachers, they also prescribed rules for the conduct of students. At the meeting of a School Committee in Pennsylvania on the First Day of the Ninth Month, 1978, the following rules were read and agreed upon:

1st Mind to have your Hands and faces washed and Heads Combed every morning before you come to school and be careful to be there by the time appointed.

2nd Come into School quietly and Soberly, and when there be Quiet and still at your proper business; and mind the instructions of the Teacher, move not from seat to seat, or go out unnecesserily, and but one at a time.

3rd Do not scribble in your own, or one anothers Speling, reading, writing or Cyphering Books; nor use one anothers pens etc without leave.

4th In coming to or going from School, behave with decency and sobriety, not differing with or purposly hurting or offending each other; mock not nor insult any person neither stop on the road to play, nor make a great and unbecoming noise.

5th Tell no untruths, or miscall one another, nor use the corrupt or unscriptural Language of you to a single person; also be Careful to Call the months and days of the week by their proper names as 1st 2nd 3rd etc and date your Books accordingly.

> 6th Let none make bargains, Sell, swop, or exchange on any account at school.
>
> 7th Let there be no Quarrels, fighting or chalanging to fight, no wrestleing or wilfully provoking one another to anger in or out of school, no throwing dirt, sticks, stones or snowballs.
>
> 8th and Lastly let these rules be observed by all, and if any wilfully trample and despise the good order of the school, after being cooly admonished without manifest signs of amendment with the approbation of two or more of the Committee they are to be discharged.[30]

The traditional attitude of the courts was that education was a privilege granted by the state, and the students surrendered their individual rights when they took advantage of the privilege. Rules for the conduct and discipline of students were seldom, if ever, questioned. The teacher, standing "in loco parentis", had almost unlimited authority over students.

In 1978, however, the United States Supreme Court said:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect...In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their view.[31]

Unless it can be demonstrated that the

> forbidden activity would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,[32]

a student may

> discuss and express all views relevant to the subject matter in the classroom without disruption,

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[30] Saturday Review of Literature, Oct. 16, 1965, p. 81.

[31] Tinker, op. cit. at 511.

[32] Ibid. at 508-9.

- use buttons, armbands and other symbolic speech if the message does not mock or ridicule,
- peaceably assemble,
- hear speakers expressing minority as well as majority viewpoints,
- publish school newspapers,
- distribute underground papers, subject to regulations with respect to time and places,
- determine their dress and appearance, except in matters of safety, health and decency,
- be free from unreasonable searches and seizures,
- organize and participate in groups of their choice, if not unconstitutionally discriminatory,
- attend school and participate in activities even if married or pregnant, health permitting.

Students must also be accorded due process in cases of suspension and dismissal.

CONCLUSION

Some educators have expressed concern about the growing activity of the courts in the educational sector. They are concerned that the courts are replacing state legislatures and local educational agencies as policy makers, taking desirable and necessary powers from school officials.

John C. Pittinger in the Harvard Educational Review, February 1978, comments in part:

> If judges have been intruding unwisely into schools and classrooms...then educators are partly to blame... Perhaps the best defense against an "imperial judiciary" would be an increased sensitivity by professional educators to the concerns of children and parents.[33]

and Nystrand and Staub in the Seventy-Seventh Yearbook of the National Society for the Study of Education say:

> Rather than taking legitimate power from

[33] P. 115.

> administrators...the courts are calling attention to past abuses, which, so long as they were unquestioned, were accepted as standard administrative practices.[34]

In a footnote in The Yale Law Journal of 1925, is the following statement:

> There is...one school of thought in the country... which denies the propriety of judicial interference, especially by the Federal Courts, with any state legislation as denying "due process of law," except where there is a procedural vice. If the state legislature makes the bed, let the people lie in it, and if the law is bad, it will eventually be repealed... But the doctrine has been settled the other way. Recognizing and accepting the mediocrity and sometimes vanity of our legislative bodies and their tendency to pass, at times, arbitrary and capricious laws, we have evolved the judicial veto, placed in the hands of men who are presumably of a higher order of intelligence and political honesty. And so, while the cases contain many declarations that a judge may not substitute his own ideas of public policy for the judgment of the lawmaker, it is nevertheless apparent that the courts regard the field of public policy as limited by what is, in the opinion of the judge, reasonable.[35]

The need to use the judicial veto to correct legislative abuses was referred to in Hobson v. Hansen.[36]

> It is regrettable, of course, in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for those great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolutions. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.[37]

During my recent vacation I reread Steppenwolf. In it the following

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[34] Raphael O. Nystrand and W. Frederick Staub. "The Courts as Educational Policy Makers", p. 39.

[35] William Waller. "The Constitutionality of the Tennessee Anti-Evolution Act." The Yale Law Journal. XXXV: 192-200 at 194 fn 10.

[36] 269 F. Supp. 401 (D.D.C. 1967), aff'd in part and appeal dismissed in part, sub nom Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969; 327 F. Supp. 844 (D.C. 1971).

[37] Ibid. at 517.

analysis of the bourgeois is recorded:

> ...what we call "bourgeois"...is nothing else than the search for a balance. It is the striving after a mean between the countless extremes and opposites that arise in human conduct...at the cost of intensity he achieves his own preservation and security. His harvest is a quiet mind... [and] he prefers...comfort to pleasure, convenience to liberty...The bourgeois is consequently by nature a creature of weak impulses, anxious, fearful of giving himself away and easy to rule. Therefore, he has substituted majority for power, law for force, and the polling booth for responsibility.[38]

If we paraphrase and substitute "educational establishment" for "bourgeois," the undermining by the courts of educational policy making may be more easily understood.

> ...what we call the educational establishment is nothing more than the search for a balance. It is the striving after a mean between the countless extremes and opposites that arise in human conduct...at the cost of intensity the educational establishment achieves its own preservation and security. The harvest is a quiet mind...and it prefers ...comfort to pleasure, convenience to liberty. The educational establishment is consequently by nature a creature of weak impulses, anxious, fearful of giving itself away and easy to rule. Therefore, it has substituted majority for power, law for force, and the polling booth for responsibility.

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[38] Herman Hesse. Steppenwolf. N.Y.: Holt, Rinehart and Winston, Inc., 1963, pp. 59-60.